

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JANNETTE SAYLOR,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 07-636-SLR
)	
STATE OF DELAWARE)	
DEPARTMENT OF HEALTH AND)	
SOCIAL SERVICES, DIVISION OF)	
CHILD SUPPORT ENFORCEMENT,)	
COMMISSIONER VINCENT P. MECONI,)	
PHD DANA J. JEFFERSON, KATHLEEN)	
TESTA, LORETTA BRASE, KATHIE)	
GIBSON, CHARLES HAYWARD,)	
MIDGE HOLLAND, DANIEL MINNICK,)	
ESCHALLA CLARKE, HEATHER)	
MORTON, and KELLY A. LANGLEY,)	
)	
Defendants.)	

DEFENDANTS' OPENING BRIEF
IN SUPPORT OF THEIR MOTION TO DISMISS

DEPARTMENT OF JUSTICE
STATE OF DELAWARE

s/s Kevin R. Slattery
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Dated: February 19, 2008

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NATURE AND STAGE OF PROCEEDINGS

On information and belief, Jannette Saylor (“plaintiff”) resides at 29 E. 23rd Street, Wilmington, DE 19802. Defendants are the State agency that formerly employed the plaintiff as well as the administrators employed by that agency. Plaintiff filed her charge of discrimination on or about January 17, 2007. The Equal Employment Opportunity Commission (“EEOC”) referral agency, the Delaware Department of Labor (“DDOL”) issued its Final Determination and Right to Sue Notice on July 13, 2007 (D.I. No. 2-3). Plaintiff acknowledges that she received her Delaware Right to Sue Notice on July 17, 2007. (D.I. No. 2-2). Plaintiff commenced the instance action on October 16, 2008, with the filing of a complaint pursuant to Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), based on race and color for employment discrimination, in the United States District Court for the District of Delaware (“Complaint”). (D.I. No. 2). On or about December 3, 2007, the Plaintiff moved the court to amend her complaint to include the named individual defendants. (D.I. No. 6).

Through the Complaint, the Plaintiff alleges discriminatory conduct occurred during her employment with the State of Delaware, Department of Health and Social Services (“DHSS”), Division of Child Support Enforcement (“defendant DCSE”). In general, plaintiff appears to allege that on or about November 14, 2006, she was discharged from her probationary appointment due to her participation in a sexual harassment investigation and “office racial discrimination complaints.”

More specifically, the Plaintiff alleges that she was “subjected to disciplinary action, work scrutiny and ultimate discharge based on participation in a sexual harassment investigation and office racial discrimination complaints.” (D.I. No. 2, page

2 of 3). She further alleges a hostile work environment, the denial of an evaluation and defamation. Id. It is her contention that the foregoing alleged conduct affected her pension, future employment with the State of Delaware and a possible transfer request. (D.I. No. 2-2).

As a result of this alleged conduct, the plaintiff is seeking: 1) a five year pension; 2) the removal of all “defamation [sic]” from her employment record; 3) re-instatement with back pay; 4) attorneys fees and costs; 5) compensatory and punitive damages; 6) and other ancillary relief. (D.I. 2-2, page 3 of 3).

This is Certain State Defendants’ Opening Brief in Support of their Motion to Dismiss the Complaint, which is filed simultaneously herewith.

SUMMARY OF THE ARGUMENT

- I. STANDARD OF REVIEW
 - a. Federal Rule of Civil Procedure 12(b)(1)
 - b. Federal Rule of Civil Procedure 12(b)(6)
- II. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES .
- III. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE THE CLAIM WAS UNTIMELY FILED
- IV. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE TITLE VII DOES NOT PROVIDE FOR SUITS AGAINST INDIVIDUALS .

STATEMENT OF FACTS

For purposes of this Motion to Dismiss, which is based solely on legal defenses, it is not necessary to recite the factual history of plaintiff's claims and dealings with the State defendants at length. Even assuming all facts alleged in plaintiff's complaint to be true, she fails to state a claim upon which relief can be granted. The pertinent procedural facts have been set forth in detail at "Nature and Stage of Proceedings," *supra*.

ARGUMENT

I. STANDARD OF REVIEW

a. Federal Rule of Civil Procedure 12(b)(1)

It is axiomatic that a court cannot entertain a complaint over which it has no subject matter jurisdiction. Federal Rule of Civil Procedure 12(b)(1). Federal district courts have only the jurisdiction provided to them by statute and the burden of establishing jurisdiction rests squarely with the plaintiff. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Dismissal for lack of subject matter jurisdiction is appropriate if the right(s) claimed by Plaintiff are “so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.” *Coxson v. Commonwealth of Pennsylvania*, 935 F. Supp. 624, 626 (W.D. Pa. 1996)(citing *Growth Horizons, Inc. v. Delaware County, Pa.*, 983 F.2d 1277, 1280-81 (3d Cir. 1993). On a facial 12(b)(1) motion to dismiss, as here, the district court will accept the factual allegations of the complaint as true and will grant the motion if it finds that plaintiff cannot invoke the Court’s jurisdiction (i.e., demonstrate a federal question) on the face of the complaint. See *Mortensen v. First Federal Savings & Loan Assoc.*, 549 F.2d 884, 891 (3d Cir. 1977). The Plaintiff bears the burden of persuasion under Rule 12(b)(1). *Coxson*, 935 F.Supp. at 626.

b. Federal Rule of Civil Procedure 12(b)(6)

The purpose of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of the complaint. *Winterberg v. CNA Ins. Co.*, 868 F. Supp. 713, 718 (E.D. Pa. 1994), *aff’d* 72 F.3d 318 (3d Cir. 1995). “A complaint

should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc.*, 140 F.3d 478, 483 (3d Cir. 1998). A pro se complaint may be dismissed for failure to state claim if it appears "beyond doubt that a Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). However, the Court does not have to accept legal conclusions, unsupported conclusions, or sweeping legal conclusions cast in the form of factual allegations. *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969); *Pauling v. McElroy*, 278 F.2d 252 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 835 (1960). Mere allegations, unsupported by facts, do not preclude dismissal and do not constitute a cause of action. *Signore v. City of McKeesport, Pa.*, 680 F.Supp. 200, 203 (W.D. Pa. 1988), *aff'd*, 877 F.2d 54 (3d Cir. 1989).

The question is not whether the plaintiff will ultimately prevail, but whether she is entitled to present evidence in support of her claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), overruled on other grounds, *Davis v. Scherer*, 468 U.S. 183 (1984). Under these standards, the plaintiff's complaint must be dismissed because, even assuming plaintiff's allegations are true, she has not invoked the subject matter of this Court and she has failed to state any claim upon which relief could be granted by this Court.

II. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

A court may dismiss a Title VII action if the plaintiff has failed to exhaust her administrative remedies. 42 U.S.C. § 2000e-5. Additionally, it is well established that a plaintiff seeking relief for alleged employment discrimination must first subject her claim to the EEOC's administrative process. *Id.*; *Brennan v. National Telephone Directory Corp.*, 881 F.Supp. 986, 993 (E.D. Pa. 1995). The purpose of the EEOC requirement is to promote conciliation rather than litigation. *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 398 (3d Cir. 1976) cert denied, 429 U.S. 1041 (1977).

Here, the plaintiff dual filed her charge with both the DDOL and the EEOC. On July 13, 2007, the DDOL issued its Right to Sue Notice. This notice, however, provides the plaintiff with the right to bring a civil action in State court only. Pursuant to 19 *Del.C.* § 714(a):

(a) A charging party may file a civil action in ***Superior Court***, after exhausting the administrative remedies provided herein and receipt of a ***Delaware*** Right to Sue Notice acknowledging same.

(Emphasis added). Consequently, the plaintiff has pursued her civil action in the wrong forum. As the EEOC has not issued plaintiff a right to sue notice pursuant to 42 *U.S.C.* § 2000e-5(f)(1), she has not exhausted her administrative remedies and cannot maintain this action in this forum. *See Burgh v. Borough Council of Borough of Montrose*, 251 F.3d 465, 470 (3rd Cir. 2001). The present suit must be dismissed for lack of subject matter jurisdiction.

III. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE THE CLAIM WAS UNTIMELY FILED

Even assuming the plaintiff had brought her Complaint in the correct forum, it would nonetheless be subject to dismissal because plaintiff has failed to file her action within the 90-day time frame required by 42 U.S.C. §2000e-5(f)(1).

Plaintiff's documentation attached to the Complaint indicates that the Delaware Right to Sue Notice was sent on July 13, 2007, and the plaintiff alleges in her Complaint that she received that Notice on July 17, 2007. Her Complaint was filed on October 16, 2007—the 91st day following her receipt of the Right to Sue Notice. Even a Complaint file one day late is subject to dismissal absent a tolling of the statute. *Mahoney v. Middlesex General*, 1986 WL 5445 (D.N.J. 1986) (Tab "A"). As the plaintiff's complaint is based upon actions occurring prior to her termination, there is no continuing violation that would justify a tolling of the statute. *Compare Vittello v. Liturgy Training Publications*, 932 F.Supp. 1093 (N.D. Ill., 1996). Consequently, her complaint must be dismissed as untimely filed.

IV. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE TITLE VII DOES NOT PROVIDE FOR SUITS AGAINST INDIVIDUALS

Plaintiff's Amended Complaint names the individual defendants: Vincent P. Meconi, Dana J. Jefferson, Kathleen Testa, Loretta Brase, Kathie Gibson, Charles Hayward, midge Holland, Daniel Minnick, Eschalla Clarke, Heather Morton and Kelly A. Langley ("the individual defendants"). The Amended Complaint, with certain exceptions, identifies all the individual defendants as employees or administrators of DHSS or DSCE. It further directs service of process for these individuals at the DSCE offices. (D.I. No.). It is clear that the plaintiff named the individual defendants in their official capacities as employees of the DHSS or DCSE. Title VII claims, insofar as asserted against the individual defendants are barred because there is no individual liability under Title VII. *Dici v. Commonwealth of Pennsylvania*, 91 F.3d 542, 552 (3d Cir. 1996); *Sheridan v. E.I.DuPont de Nemours and Co.*, 100 F.3d 1061, 1077 (3d Cir. 1996); *see also, Newsome v. Admin. Off. of Courts*, No. 00-4327, 51 Fed. Appx. 77, 78 n. 1 (3d Cir. Oct. 4, 2002); *Cortes v. Univ. of Med. & Dentistry of N.J.*, 391 F. Supp. 2d 298, 311 (D.N.J. 2005). Therefore, the claims against the individual defendants are not proper and should be dismissed with prejudice.

CONCLUSION

Even accepting the allegations in plaintiff's Complaint as true, she has failed to invoke the subject matter jurisdiction of this court and has failed to state any claim against the defendants upon which relief could be granted. For the foregoing reasons, the defendants respectfully request that this Honorable Court grant their Motion to Dismiss plaintiff's Complaint with prejudice.

**DEPARTMENT OF JUSTICE
STATE OF DELAWARE**

s/s *Kevin R. Slattery*
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Dated: February 19, 2008

TAB "A"

Westlaw.

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(Cite as: Not Reported in F.Supp.)

Mahoney v. Middlesex General University Hosp.
D.N.J., 1986.

Only the Westlaw citation is currently available.

United States District Court, D. New Jersey.

NELSON MAHONEY, Plaintiff,

v.

MIDDLESEX GENERAL UNIVERSITY HOSPITAL, Defendant.

Civ. A. No. 85-4890.

May 7, 1986.

Lindabury, McCormick & Estabrook, P.C. By John
H. Schmidt, Jr., Westfield, N.J., for Defendant.

OPINION

FISHER, Chief Judge.

*1 This action is an employment-discrimination suit based upon 42 U.S.C. § 2000e. Defendant has submitted a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(h)(3) for lack of subject-matter jurisdiction because of plaintiff's failure to file the complaint within the 90-day limit following the receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC) pursuant to 42 U.S.C. § 2000e-5(f)(1).

Plaintiff, Nelson Mahoney, filed a complaint with this court against defendant, Middlesex General University Hospital, on October 10, 1985, alleging that he was the victim of employment discrimination. The complaint stated that Mahoney was a stationary engineer with a class 1-B license at the hospital. Around July of 1984, the hospital had an opening for a chief engineer, a job that requires under New Jersey law a class A or B license. Mahoney believes that the person hired by the hospital to assume the duties of chief engineer was unqualified because he possessed only a class C license. Mahoney alleges that he was passed over by the hospital because he is black. He further alleges that the hospital 'excludes all, or substantially all, blacks, . . . from supervisory, managerial or profes-

sional [positions] on the basis of their race.' Plaintiff's Complaint at 2.

Mahoney filed a claim with the EEOC within the 180-day limit after the alleged unlawful employment practice occurred as required by 42 U.S.C. § 2000e-5(e). A notification of a right to sue was received by Mahoney from the EEOC on July 10, 1985. The complaint was filed in this court on October 10, 1985. Defendant filed this motion to dismiss the complaint stating that the complaint was not filed timely as required by 42 U.S.C. § 2000e-5(f)(1). Because the complaint was not filed timely, the court lacks subject-matter jurisdiction.

Title 42 U.S.C. § 2000e-5(f)(1) states in pertinent part that

[i]f a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within 180 days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission or Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Courts construing the statutory time period have uniformly determined the triggering day to be the date the notice of right to sue is received by plaintiff. Motley v. Bell Telephone Co. of

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(Cite as: Not Reported in F.Supp.)

Pennsylvania, 562 F. Supp. 497, 498 (E.D. Pa. 1983). For the purposes of computing the 90-day period under section 2000e-5(f)(1), the first day is omitted and the last day is counted. Dunlap v. Sears Roebuck & Co., 478 F. Supp. 610, 611 (E.D. Pa. 1979). Mahoney alleges in his complaint that the notice of right to sue was received on July 10, 1985, and the complaint was not filed until October 10, 1985. Thus, 91 days elapsed from the time the right-to-sue letter was received by Mahoney to the time the complaint was filed.

*2 The hospital argues that the **90-day limit** in section 2000e-5(f)(1) is jurisdictional. It cites Decker v. Anheuser-Busch, Inc., 632 F.2d 1221 (5th Cir. 1980); Dunlap v. Sears Roebuck & Co., 478 F. Supp. at 611; and Prophet v. Armco Steel, Inc., 575 F.2d 579 (5th Cir. 1978), all of which held the **90-day limit** to be jurisdictional. Thus, under this holding, if one were to file past the **90-day limit**, the **district court** would dismiss for lack of subject-matter jurisdiction. The cases cited by defendant, however, were decided before Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), which held that the **90-day** period of limitations in title VII actions may be equitably tolled when circumstances warrant. The Third Circuit agrees that the **90-day** rule is not a jurisdictional predicate but, nevertheless, the court cannot extend the limitations period by even one day in the absence of equitable consideration. Mosel v. Hills Department Store, Inc., No. 85-3567, slip op. at 4 (3d Cir. May 1, 1986) (per curiam) (citing Johnson v. Al Tech Specialties Steel Corp., 731 F.2d 143, 146 (2d Cir. 1984)).

At this point, a brief detour is in order to clarify the nature of 42 U.S.C. § 2000e-5(f)(1)'s **ninety-day** requirement and the procedural path for assessing whether it has been satisfied. The **district court** dismissed this action for want of jurisdiction. We note, however, that commencing an action within **ninety days** of receipt of a right-to-sue letter is not a jurisdictional prerequisite; rather the **ninety-day** requirement is akin to a statute of limitations . . .

Espinoza v. Missouri Pacific R. Co., 754 F.2d 1247, 1248 n.1 (5th Cir. 1985) (citations omitted). See also Brown v. J.L. Case Co., 756 F.2d 48, 50 (7th Cir. 1985); Johnson v. Al Tech Specialties Steel Corp., 731 F.2d at 146.

It has also been held that

[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980), 'in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'

Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152 (1984). Because Mahoney filed his complaint past the **90-day limit**, the court must dismiss the suit in accordance with the statute. Defendant's motion for dismissal of the complaint is granted. An order accompanies this opinion. No costs.

D.N.J., 1986.

Mahoney v. Middlesex General University Hosp.
Not Reported in F.Supp., 1986 WL 5445 (D.N.J.)

END OF DOCUMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JANNETTE SAYLOR,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 07-636-SLR
)	
STATE OF DELAWARE)	
DEPARTMENT OF HEALTH AND)	
SOCIAL SERVICES, DIVISION OF)	
CHILD SUPPORT ENFORCEMENT,)	
COMMISSIONER VINCENT P. MECONI,)	
PHD DANA J. JEFFERSON, KATHLEEN)	
TESTA, LORETTA BRASE, KATHIE)	
GIBSON, CHARLES HAYWARD,)	
MIDGE HOLLAND, DANIEL MINNICK,)	
ESCHALLA CLARKE, HEATHER)	
MORTON, and KELLY A. LANGLEY,)	
)	
Defendants.)	

CERTIFICATE OF MAILING AND/OR DELIVERY

The undersigned certifies that on February 19, 2008, she caused the attached **DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS** to be delivered to the following person(s) in the form and manner indicated:

NAME AND ADDRESS OF RECIPIENT(S):

Jannette Saylor
29 E. 23rd Street
Wilmington, DE 19802

MANNER OF DELIVERY:

 X Two true copies by first class mail, postage prepaid, to each recipient

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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